



The American Bar Association

Consumer Protection Committee
Corporate Counseling Committee
Private Advertising Litigation Committee

February 2011 Consumer Protection Update

March 3, 2011
Noon – 1:00 p.m. ET

This telephonic update will summarize the significant developments in consumer protection law that occurred during February 2011. The presentation will cover cases, settlements, and other initiatives at the federal and state levels, as well as consumer class actions, Lanham Act litigation, and National Advertising Division case decisions.

This program is a monthly series of updates in which individuals can call in and hear consumer protection practitioners report on the previous month's developments. The prepared portion of the program will last approximately 40-50 minutes and will be followed by Q&A.

The Lustigman Firm will provide this month's update, with the following panel of presenters:

Andrew Lustigman
Scott Shaffer
Adam Solomon
Franklyn Hernandez

Christie Grymes from Kelley Drye & Warren LLP will moderate. To register, send an e-mail to chomer@kelleydrye.com. The call-in number and program materials will be sent prior to the program.

Recordings of this program will be posted on the Section website, and downloadable in an MP3 format. Please visit http://www.americanbar.org/groups/antitrust_law.html after the program to listen/download the audio.

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**ABA Section of Antitrust Law
Consumer Protection Committee**

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Presented by

The Lustigman Firm, P.C.

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Agenda

1. FTC Developments
2. Federal Privacy Developments
3. State Law Developments
4. Private Litigation Developments
5. NAD Developments

FTC Developments

FTC reviewing Apple iPhone in-app purchases

- FTC Chairman Leibowitz confirms FTC will inspect Apple's in-app purchasing policy that allows iOS users to log in once and make additional purchases and downloads for 15 minutes
- Review occurs after Congressional request
- Allegations:
 - “free” downloadable applications charge once inside of application
 - children may be misled to make a purchase without understanding nature of transaction

FTC v. Phillip Flora (C.D. Cal.)

- FTC alleged that defendant violated CAN-SPAM Act and Section 5(a) of FTC Act by sending unsolicited texts and emails regarding mortgage loan modifications
- Messages directed consumers to www.loadmod-gov.net, though business was not government-affiliated
- Sender failed to comply with CAN-SPAM opt-out language and physical address requirement
- Court rejects FTC's request for ex parte asset freeze but enters temporary restraining order barring:
 - sending unauthorized or unsolicited commercial electronic text messages
 - representation of government affiliation

Credit Report Resellers

- FTC settles charges against three credit report resellers who allegedly failed to take reasonable steps to protect personal information from hackers
- Respondents:
 - *Settlement One Credit Corporation*
 - *ACRAnet, Inc.*
 - *Fajilan d/b/a Statewide Credit Svcs.*
- Businesses purchased credit reports from consumer reporting agencies and resold them to mortgage brokers, etc., to determine credit eligibility

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- FTC alleged that resellers lacked information security procedures, allowed unsecured access, and failed to take proactive measures after prior data breaches
- Allegedly violated GBL, FCRA, and FTC safeguard rules
- Respondents agreed to:
 - Implement comprehensive security program to control risks, holds employees accountable
 - Biennial assessment for 20 years
 - Allow FTC to monitor compliance

The Dannon Co., Inc.

- The FTC approved a settlement with The Dannon Company, Inc. regarding allegations of deceptive claims for Activia Yogurt and DanActive dairy drink that contain probiotics
- Settlement governs yogurts, dairy drinks, and probiotic foods
- Order prohibits cold/flu claims without FDA approval
- Requires at least two well-designed studies covering claims for temporary irregularity and slow intestinal transit time
- For essentially equivalent products, this deal includes new ingredient testing standards regarding differences in ingredients impeding or inhibiting the effectiveness of the ingredients
- Dannon paid \$21 million in December 2010 to 39 states

Federal Privacy Developments

Rush Introduced Online Privacy Bill, H.R. 611, The Best Practices Act

- Best Practices Act (HR 611) seeks to establish a comprehensive privacy bill
- Bill would ensure consumers have meaningful choices about the collection, use, and disclosure of their personal information
- Bill would require:
 - companies collecting personal information to disclose practices with respect to the collection, use, disclosure, merging, and retention of personal information, and explain consumers' options regarding those practices

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- obtain "opt-in" consent to disclose information to a third party ("third party" would be defined based on consumers' reasonable expectations rather than corporate structure)

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- Do Not Track Me Online Act of 2011 (HR 654) would allow consumers to prevent the collection and use of data on their online activities
- Bill would direct the FTC to develop a “Do Not Track” mechanism that would allow individuals to opt out of the collection, use or sale of their online activities, and require covered entities to honor that choice. Failure to do so would be an unfair or deceptive act punishable by law. The covered entity would have to disclose its collection and sharing practices, including with whom the information is shared
- Bill would allow the FTC to exempt common practices like the collection of information for billing purposes

State Law Developments

Maryland AG Sues Direct Mailer

- Maryland AG filed suit against Synchronicity, LLC and its owner/manger Michael Connors
- Alleges company used various names as if it were a government agency, a firm handling class actions or a prize company and represented that consumers were eligible to receive cash grants, awards or prizes worth millions of dollars
- Alleges consumers sent more than \$2 million to company and received \$1 checks or nothing substantial in return
- Alleges the mailings were deceptive and seeks an order requiring the defendants to cease sending deceptive offers to Maryland residents or using a Maryland address, to return the fees collected, and to pay penalties and costs

Illinois AG Sues Marketing Firm For Selling Fraudulent Customer List

- Illinois AG filed suit against Select Marketing Solutions Management and two individuals
- Alleges defendants sold lead lists to financial advisors, insurance companies and sales people without verifying that listed consumers wanted to be contacted and without checking their names against the national Do Not Call registry
- Businesses in Illinois and out-of-state businesses reported losses totaling more than \$11,000 from purchasing lists they believed to be accurate. Companies that contacted consumers on the lists found numbers were disconnected or consumers reached had never been contacted by Select Marketing for their approval
- Lawsuit seeks to bar defendants from selling leads, void all their pending contracts with their customers, and require the company to pay refunds to affected customers

Washington AG Settles with Marketer of Auto Warranties

- Washington AG reached a settlement with a company accused of hawking pricey service contracts through deceptive junk mail, illegal robocalls and misleading TV ads
- Defendants accused of calling consumers on national Do Not Call registry, bypassing caller ID, refusing to allow consumers an opportunity to review contracts, denying valid refund requests, improperly obtaining consumers' personal information and violating state licensing and registration laws
- The state's settlement bans Credexx Corp d/b/a Auto One Warranty Specialists and its former owner, David J. Tabb, from doing business in Washington again
 - Tabb paid \$5,000 to reimburse the state for costs of investigation
 - Civil penalty of \$70,000 against Credexx is suspended because the company is defunct

Florida Seeks to Ban Electronic Sweepstakes Machines

- Florida House Bill 217 - Electronic Machines and Devices for Sweepstakes Prohibited Act
- Similar to North Carolina's House Bill 80, which took effect on December 1, 2010
- Bill takes aim at so-called 'sweepstakes parlors' which seek to obscure gambling activities under the guise of offering sweepstakes promotions complete with a free method of entry
- Bill is before the Business and Affairs Subcommittee of the Florida House. An identical Senate Bill (SB 576) is before the Senate Commerce / Tourism Committee

Private Litigation Developments

Pineda v. Williams-Sonoma Stores

51 Cal. 4th 524 (Cal. Feb. 10, 2011)

- California Supreme Court holds that a ZIP Code is personal identification information under Cal. Civ. Code §1747 *et seq.*, reversing previous judicial interpretation of statute
- Court read statute liberally to give effect to legislature's intent to protect consumers from unnecessary collection of their personal information
- Plaintiff was asked to provide her ZIP code during credit card purchase at Williams-Sonoma store

Pineda v. Williams-Sonoma Stores

- Plaintiff complied, believing information was necessary
- Plaintiff alleges Defendant used her ZIP code to determine her full address in violation of statute
- Complaint was dismissed at trial court level on basis that ZIP Code is not personal identification information; appellate court had affirmed trial court's ruling
- Cal. Civ. Code §1747 *et seq.* prohibits businesses from requesting that cardholders provide “personal identification information” during credit card transactions, and then recording that information.

Pineda v. Williams-Sonoma Stores

- California Supreme Court holdings:
 - ZIP code part of address and therefore is personal identification information
 - ZIP code not necessarily different from full address or telephone number
 - ZIP code is unnecessary to credit card transaction and can be used to determine full address
 - Maintains consistency with other sections of Cal. Civ. Code §1747

Ferreira v. Groupon, Inc. and Nordstrom, Inc.

No. 11-cv-0132-DMS-POR (S.D. Cal.)
Complaint Filed on January 21, 2011

- Plaintiff challenges popular site Groupon.com for issuing allegedly illegal gift certificates
- Groupon is a popular service combining social networking and shopping
- Plaintiff purchased Groupon for use at Nordstrom
- Groupon creates “sales frenzy” and subjects consumers to “onerous” expiration dates designed to create windfalls
- Potential issue – are Groupons gift certificates?

Weiner v. Snapple Bev. Corp.

2011 U.S. Dist. Lexis 6094 (S.D.N.Y. Jan. 21, 2011)

- Snapple granted summary judgment due to inability to show injury or reliance
- Plaintiff made claims under Section 349 of N.Y. Gen. Bus. L., unjust enrichment, and breach of express warranty over use of the phrase “all natural” on Snapple packaging
- Plaintiff sought difference between premium price for “all natural” Snapple and other comparable, lower priced beverages
- Deposition testimony consisting of plaintiff’s best guesses on prices was insufficient evidence

Gutierrez v. Barclays Group

2011 U.S. Dist. Lexis (S.D.Cal. Feb. 9, 2011)

- Class action filed under the Telephone Consumer Protection Act (47 U.S.C. § 227) for improper collection calls to plaintiffs' cell phones without prior consent
- Calls were illegal under TCPA unless the caller had prior consent. Defendants claimed they had prior consent because Ramon Gutierrez provided the two cell phone numbers on his credit application (one of the numbers belonged to his wife)
- Plaintiff alleged that when they began receiving calls to their cell phones, they told the caller to stop calling them
- The court ruled that “prior express consent may be revoked orally” and denied defendants' summary judgment motion

NAD Developments

NAD Closes Sprint's Challenge Against T-Mobile

- Sprint challenged claims made by T-Mobile concerning its 4G Network because, Sprint alleged, T-Mobile has no 4G Network
- Soon after challenge was commenced, NAD learned that a class action had been filed in the Northern District of California
- The class action involved the same services and claims that formed the basis of the NAD challenge
- Pursuant to NAD procedures, the NAD administratively closed the case because the pending class action made it no longer appropriate for formal NAD investigation

Hockey Helmet Maker Discontinues Testimonials

- Previously, NAD ruled Cascade Sports should discontinue claims that its hockey helmet reduced the incidence and severity of concussions
- Bauer Hockey alleging Cascade's website used testimonials that made the same claims NAD previously barred
- Bauer Hockey also complained about consumer statements on a message board "forum" page of Cascade's website
- The testimonials had to be removed because a testimonial is equivalent to a representation that the product is effective for the stated purpose. Therefore, an advertiser must possess adequate substantiation to support testimonials in the same manner it would have to do for an express representation
- NAD did not decide whether postings to a message board constituted "advertising"-- the message board postings were not part of original challenge

Disclaimers Cannot Rescue EchoStar's Unsupported Claim

- In the underlying challenge, NAD recommended EchoStar Communications discontinue claims of 99.9% signal reliability
- Claim was inappropriate because even if the signal is emitted 99.9% of the time, a consumer might not be able to receive it 99.9% of the time
- EchoStar had continued the 99.9% claim, but had added disclaimer that “reception may vary for individual customers”
- NAD ruled that the added disclaimer did not cure the reasonable interpretation that the ads promised interruption-free service 99.9% of the time. All use of the 99.9% claim should be discontinued
- Disclosures that substantially contradict or change the main message of an advertisement are inadequate to prevent inaccurate consumer take-aways

PatentHEALTH Referred to FTC for Possible Enforcement Action

- This is another compliance proceeding. Previously, NAD ruled that advertising for the pain reliever Triglosamine could not claim “rapid relief” from pain and had to change its claims that the product “works” faster than Glucosamine alone to “begins to work” faster
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- PatentHEALTH disregarded both the spirit and the letter of NAD and NARB decisions. Because the self-regulatory process was exhausted, NAD referred the matter to the FTC for possible enforcement action
- NAD conceded that with respect to the advertorial or faux-news format, there is a lack of clear regulatory standards, but the proper analysis should focus on overall consumer perception and not simply whether the word “advertisement” appears as a disclosure

Despite Twice Failing to Comply with NAD, Heartland Sweeteners Avoids Further Action

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- Heartland markets a no-calorie sweetener called Nevella. The original challenge determined that Heartland could not tout any purported health benefits of Nevella
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